Kentucky Law Journal

Volume 41 | Issue 3 Article 4

1953

Plaintiff's Violation of a Statute as Affecting Recovery for Negligence--"Proximate Cause"

William S. Tribell
University of Kentucky

Notes and Comments

PLAINTIFF'S VIOLATION OF A STATUTE AS AFFECTING RECOVERY FOR NEGLIGENCE—"PROXIMATE CAUSE"

In the recent case of *Hinton* v. *Dixie and Ohio Exp. Co.*,[1] the plaintiff attempted to pass defendant without blowing his horn, an act in violation of KY. REV. STAT. 189.340 subsection (1) (1948). He had previously flashed his headlights and defendant had given him the "go ahead" signal by flashing his tail lights—this being the custom followed by truckers when passing. Plaintiff started around defendant and when he pulled up alongside him, defendant swerved against plaintiff's truck forcing it off the road. In defense to an action for negligence defendant set up plaintiff's violation of the statute. The lower court directed a verdict for defendant on the ground that plaintiff was guilty of contributory negligence as a matter of law because of such violation. Judgment was reversed by the Circuit Court of Appeals for the Sixth Circuit. Plaintiff's negligence was not a bar to his recovery unless it was the "proximate cause" of the injury, although it was a violation of a statute. Whether such negligence is the proximate cause is a question for the jury to decide.

In some of the old cases it was held that plaintiff's violation of a statute constituted an absolute bar to recovery because one could not base an action on his own illegal conduct.[2] Examples of the application of this rule were the Sunday driving cases,[3] and perhaps the Massachusetts cases involving plaintiff's driving of an unregistered, or unlicensed automobile.[4]

The rule established by these cases has been changed by the courts, however, so that today it may be said that a violation of a statute by the plaintiff is not a bar to recovery if: (1) the statute was not passed for the protection of the defendant and his class,[5] (2) the

---

[1] 188 F. 2d 121 (6th Cir. 1951).

[2] See PROSSER, TORTS 276 (1941), citing Davis, *The Plaintiff's Illegal Act as a Defense in Action of Tort*, 18 HARV. L. REV. 505 (1905). Davis manages to prove the soundness of the Sunday driving cases.

[3] Johnson v. The Town of Irasburg, 47 Vt. 28 (1874); Hinkley v. Inhabitants of Penobscot, 42 Me. 89 (1865); Bosworth v. Inhabitants of Swansey, 10 Metc., (Mass.) 363 (1845); PROSSER, *op. cit supra*, note 1 at 276; Cf. PROSSER at 174; HOLMES, THE COMMON LAW 112-113 (1881); I HARPER, TORTS, 188-191 (1933).

[4] Dudley v. Northampton St. Ry. Co., 202 Mass. 443, 89 N.E. 25 (1909). The court seems to rely in part on "proximate cause," however.

[5] Town of Remington v. Hesler, 111 Ind. App. 404, 41 N.E. 2d 657 (1942); Ross v. Reigelman, 141 Pa. Super, 203, 14 A. 2d 591 (1940); Clark v. Hampton, 83 N. H. 524, 145 Atl. 265 (1929); Powell v. Virginian Ry. Co. 187 Va. 384, 46 S.E. 2d 429 (1948).

statute was not passed to protect him from the type of harm incurred;[6] (3) or if the violation was excused;[7] (4) or if the violation was not the proximate cause of the injury.[8]

By an application of the doctrine of "proximate cause", the courts have allowed statute violating plaintiffs to recover. The usual statement goes something like this, "It is only when the violation of such statute as this is the proximate cause of the injury that the party so offending is guilty of contributory negligence as a matter of law so as to bar his action."[9]

It is not the rule which is objected to by this writer, but the frequent misapplication of the rule by the courts. Although this misapplication usually occurs, as in the principal case, by the courts submitting the question of proximate cause to the jury when it should be decided by the court, the problem can (and does) occur in other ways.[10] As an example, the problems of scope of duty and interpretation of statutes are not infrequently concealed by the all enveloping cloak of "proximate cause."

In many cases it has properly been decided that the question of proximate cause should go to the jury, as where the plaintiff did not have his parked auto completely off the highway when defendant ran into it;[11] or where the plaintiff was driving at night with only one headlight;[12] or with defective lights.[13] In a California case the plaintiff, who failed to extend her arm 50 feet before turning, turned one and one half feet into the left lane and stopped. Defendant, exceeding the speed limit and weaving from side to side somewhat, hit plaintiff's

[6] Cooper v. Hoeglund, 221 Minn. 446, 22 N.E. 2d 450 (1946); Salvitti v. Throppe, 343 Pa. 262, 23 A. 2d 445 (1942); Rampon v. Washington Water Power Co., 94 Wash. 438, 162 P. 514 (1917); RESTATEMENT, TORTS, sec. 469 (1941).

[7] Herman v. Sladofsky, 301 Mass. 534, 17 N.E. 2d 879 (1938).

[8] Melcher v. McMahon, 184 Minn. 476, 239 N.E. 605 (1931); Beebe v. Hannett, 224 Mich. 88, 194 N.E. 542 (1923); Bressett v. O'Hara, 116 Vt. 118, 70 A. 2d 238 (1950); Valley Transport System v. Reinartz, 67 Ariz. 380, 197 P. 2d 269 (1948); RESTATEMENT, TORTS, sec. 465 (1934). Cf. Johnson v. Boston and Me. Ry. Co., 83 N. H. 850, 43 Atl. 516 (1928) where Judge Pleaslee after noting carefully that ". . . the mere fact that one is violating a statute when injured does not bar a recovery," held that one driving without a driver's license was barred from recovering against a negligent railroad since "plaintiff's act of operating a car was causal in strictest sense." This conclusion has been considerably criticized, see Pratt, Adm'r v. Western Bridge & Construction Co., 116 Neb. 553, 218 N.W. 391 (1928).

[9] Atkins v. Churchill, 30 Wash. 2d 859, 194 P. 2d 364 (1948).

[10] Eg. Roos v. Loeser, 41 Calif. App., 183 Pac. 204 (1919) where plaintiff was allowed to recover for the death of his unlicensed dog at the hands of defendant's licensed dog on the ground that defendant's dog did not notice the absence of the tag and hence it was not causal. The case is discussed by Prosser in his article *Proximate Cause in California,* 38 CAL. L. REV. 369, 370 (1950).

[11] Valley Transport System v. Reinartz, 67 Ariz. 380, 187 P. 2d 269 (1948).

[12] Beebe v. Hannett, 224 Mich. 88, 184 N.W. 542 (1923).

[13] Oscilla v. Luke, 28 Ga. App. 234, 110 S.E. 557 (1922).

left fender although 13½ feet was available on the highway through which he could have driven. Both the trial court and the California Court of Appeals held that the plaintiff was not barred by contributory negligence.[14]

Although the case was probably tried by the court without a jury, it may be fairly said that plaintiff's violation of the statute was a substantial factor in causing the accident, and would have been a proper case for the jury on the question of proximate cause. Another case in which, in the writer's opinion, it was proper to submit the question of proximate cause to the jury, was a case involving a boy who, while riding a bicycle along the defendant city's streets at night, without a light as was required by a city ordinance, ran into an excavation in the street.[15] In cases such as these, where it is clear that the plaintiff violated the statute or ordinance there may be some question for the jury as to whether or not it was a "substantial factor." Granted it was an actual cause, there may be a question for the jury to decide if there is any rule restricting his responsibility because of the manner in which his conduct contributed to the harm.[16]

In a few instances the courts have, on the facts, properly taken the question of proximate cause from the jury and have held as a matter of law that the plaintiff's violation of the statute was the proximate cause. An illustration of this may be found in the Kentucky cases[17] where the plaintiff failed to stop at a stop sign and ran out onto the highway in front of defendant's speeding car. There the Kentucky court held that the plaintiff's violation of the statute was the proximate cause of the accident as a matter of law. A California case[18] where the plaintiff was a passenger in a bus owned and operated by defendant, is another illustration of the latter proposition. In that case plaintiff arose from her seat, walked to the front of the bus and stood on its steps, in violation of an ordinance,[19] as it traveled along the streets. The bus gave a sudden jerk and plaintiff was thrown into the street and injured. The trial court gave a judgment for the defendant notwithstanding the verdict. The question presented the California Court of Appeals was whether plaintiff was contributorily negligent as a matter of law, or should the issue have been left to

[14] McWane v. Hetherton, 51 Cal. App. 2d 508, 125 P. 2d 85 (1942).
[15] Kercher v. Conneaut, 76 Ohio App. 491, 65 N.E. 2d 272 (1945).
[16] RESTATEMENT, TORTS, sec. 465 (1934).
[17] Romans v. Duke, 313 Ky. 157, 230 S.W. 2d 728 (1950); Huber & Huber Motor Exp. Co. v. Crowley, 303 Ky. 101, 196 S.W. 2d 965 (1946); Mullen v. Coleman, 297 Ky. 351, 179 S.W. 2d 600 (1944).
[18] Reeves v. Lapinta, 25 Cal. App. 2d 680, 78 P. 2d 465 (1938).
[19] The ordinance provided "No person shall ride upon the fender, steps, or running board of any street car or vehicle."

the jury. In answering "no" to the question the Court said, "As a general rule the issue of contributory negligence is one for the jury. But if the violation of the statute or ordinance contributes *directly* to the plaintiff's injury, the issue is not one of fact but is an issue of law, and is therefore removed from the consideration of the trier of fact. . . . The ordinance enacted an absolute standard of conduct, and removed from the jury the right to speculate as to what . . . the man of ordinary prudence might or might not have done under similar circumstances. It thereby substituted certainty of conduct for uncertainty. If the violation of the ordinance proximately contributed to their injuries appellants were guilty of contributory negligence as a matter of law."[20]

In these instances the courts have applied the rule as to proximate cause correctly, and have refused to allow a statute violating plaintiff to recover when the violation was without doubt a substantial factor in causing the injury.

Unfortunately, however, in many cases the court will submit the question of proximate cause to the jury where there clearly is proximate cause and where there clearly is not proximate cause. In still other cases the court will gratuitously take the case from the jury and rule as a matter of law that the plaintiff's violation of the statute was or was not the proximate cause when it should not because the question is one on which reasonable men could differ. An example of the latter proposition is a Washington case[21] where the defendant's auto was standing almost completely across plaintiff's side of the highway, when plaintiff, who was driving with defective lights and was also exceeding the speed limit, ran into defendant's auto. The trial court granted a motion for dismissal on the ground that plaintiff's negligence was the proximate cause and this holding was affirmed by the Washington Supreme Court. Surely reasonable men would differ as to whose negligence was the proximate cause in this case. How could it be said, as a matter of law, that the accident would not have occurred in all events had the plaintiff been obeying the traffic law? A jury might well find that had the defendant's auto not been across the highway, the plaintiff could have passed that point with all safety, even though he was exceeding the speed limit and was driving with defective lights. It is submitted that such a case should go to the jury on the question of proximate cause.[22]

In that class of cases in which the violation of a statute by the

[20] *Supra,* note 18.
[21] Allen v. Porter, 19 Wash. 2d 503, 143 P. 2d 328 (1943).
[22] Ramsey v. Sharpley, 294 Ky. 286, 171 S.W. 2d 427 (1943); Murphy v. Homans, 286 Ky. 191, 150 S.W. 2d 14 (1940).

plaintiff clearly was the proximate cause of the accident, the court has some times left the question of proximate cause to the jury (usually to the advantage of plaintiff). The cases where the plaintiff is crossing a street in the middle of the block in violation of a city ordinance and is struck by the defendant who is exceeding the speed limit are submitted as examples. The Kentucky Court of Appeals in this situation has held that whether the plaintiff's violation of the ordinance was the proximate cause of the accident was a question for the jury to decide.[23] On the other hand the Supreme Court of California, in a similar situation, has held that the plaintiff's violation of the ordinance was the proximate cause of the accident as a matter of law, although if the facts were such as would bring the case within the doctrine of "last clear chance", the plaintiff could still recover.[24] It is the writer's opinion that the California Court reached the correct result, because, as is required by the doctrine of proximate cause "the plaintiff violated the standard of conduct fixed by the body which passed the ordinance, and without the violation of the ordinance the injury would not have occurred, and further, no intervening forces were involved."[25]

Another case of this type is one where deceased's auto was being driven 35 to 40 M.P.H., in a 15 M.P.H. speed zone, on a wet slippery highway.[26] The left front wheel struck a defect in the roadbed some two or three inches deep and some 24 inches square, causing the driver to lose control of the auto which plunged over an embankment. The question of proximate cause was left to the jury and resolved in plaintiff's favor. The defect in the roadbed was not of such proportions as to be dangerous, and it requires no stretch of the imagination to say that had the plaintiff been driving within the speed limit the accident never would have occurred. There were no intervening forces to break the chain of causation. It is difficult to discover any basis

---

[23] Perch v. N. Y. C. R. Co. noted in B. U. L. REV. 190 (1941), 293 N.W. 778, 294 MICH. 227. Plaintiff presents a similar situation when parked at gates of R. R. crossing, and was struck from rear by negligently driven car and then struck by defendant's train operating in excess of speed limit. *Held* as a matter of law that the railroad's violation of the speed law was not the proximate cause of this accident. The decision has been criticized because ". . . the majority opinion recognizes and discusses in detail the complexities arising out of the fact situation, so that . . . the opinion is a virtual admission that the case involves jury question. Note 21 B. U. L. REV. 190 (1941).

[24] Menicke v. Oakland Garage Inc., 111 Cal. 2d 255, 279 P. 2d 91 (1940).

[25] Smith v. Zone Cabs, 135 Ohio 415, 21 N.E. 2d 336 (1939). Noted 6 OHIO STATE L. Q. 106 (1940). The note writer admits "proximate cause is too evident to be denied. . . . Reasonable minds could not differ on any but unique circumstances" but then defends the decision of the court that the case should go to the jury on a proximate cause instruction as a practical solution of the problem of how to hold negligent drivers despite the statute.

[26] Medley v. Buford, 58 Ga. App. 48, 197 S.E. 494 (1938).

upon which the jury could find that the plaintiff's negligence in violating the statute was not the proximate cause.

In a Virginia traffic case the court submitted the question of whether the plaintiff's violation of a statute was the proximate cause to the jury[27] where the deceased and two others were walking along the right hand side of a highway at night in violation of a statute.[28] Defendant's employee, driving a truck, approached from behind them. They discovered his approach and moved to the right edge of the highway and stood talking with their backs toward the center of the road. The truck struck the three and killed two of them, one of whom was plaintiff's intestate. The Supreme Court of Virginia upheld a submission of the question of proximate cause to the jury. Clearly the plaintiff's intestate violated the standard of conduct prescribed by the legislature. The accident could not possibly have happened had he conformed to this standard. There were no intervening forces or cause which the jury could consider. When such is the case it is no longer a question for the finder of fact, but becomes a question of law for the court. There are two possible bases upon which the court could have absolved the intestates from blame in violating the statute. It could have said either that the violation was excused on the ground that it was safer for them to walk on the other side to avoid the glare from the lights of the oncoming cars (this, however, was not shown); or that the purpose of the statute was that the pedestrians should have notice of approaching cars, and that this purpose was satisfied when the deceased became aware of the approach of the defendant's truck. In neither event, however, should the case have been tossed into the morass of proximate cause.

In the final case to be considered which comes within this category, the defendant turned into the left lane as if to make a left hand turn. The plaintiff, in violation of a statute, attempted to pass defendant on the right side when defendant swerved back into the right lane and struck plaintiff's auto.[29] Once again the question of proximate cause was left to the jury. Had the plaintiff not attempted to pass on the right side of defendant, he could have re-entered the right lane with all safety. It seems again that the plaintiff's own violation of the statute was the proximate cause of his injury.

In the third and last group of cases the court has left the question of proximate cause to the jury when the facts justify a direction of

[27] Gregory v. Daniel, 173 Va. 442, 4 S.E. 2d 786 (1939). Cf. Crouse v. Pugh, 188 Va. 156, 49 S.E. 2d 421 (1948).

[28] The statute provided, "Pedestrians using the highways for travel shall keep as near as possible to the extreme left edge thereof."

[29] Chattanooga Ice and Delivery Co. v. George F. Burnett Co., 24 Tenn. App. 535, 147 S.W. 2d 750 (1940).

the verdict for the plaintiff, because his violation of the statute in no way contributed to the injury, as where defendant suddenly swerved his auto into the left lane immediately in front of plaintiff's oncoming car which was exceeding the speed limit.[30] It would certainly seem that the speed of plaintiff could not have caused the collision as long as he remained on his side of the road.

It is submitted that the principal case is further illustration of this abuse of the doctrine of proximate cause, because if the defendant knew that plaintiff was passing him (which he did know, evidenced by his giving plaintiff the "go ahead" signal) then the fact that plaintiff did not blow his horn would have made no difference. If plaintiff had blown his horn the defendant would have had no more knowledge of the situation than he already had; and would have reacted no differently. Instead of asking the jury to decide whether plaintiff's violation was the proximate cause of the accident, the court should have instructed the jury in something like the following language: "If you believe that the defendant knew that plaintiff was passing him and that even had the plaintiff blown his horn defendant would have had no more notice of plaintiff's intention to pass than he had already then such failure was not the proximate cause of the injury and return a verdict for plaintiff; if not, then for the defendant."

By such applications of the proximate cause doctrine as have been considered in the preceding pages the courts have often evaded a positive duty and have circumvented the real issue in many cases by requiring the jury to decide a question which should have been decided by the court. Thus they have allowed the plaintiff to recover in many cases when he should not have, merely because the court did not think the statute should have have been passed in the first place, or because in some instances it may reach a bad result, or some other reason. More rarely, as in the present case, mishandling of the proximate cause issue, set free a negligent defendant. Certainly questions of actual causation, scope of duty, excuse for violation, last clear chance and comparative negligence should not be made to depend upon the "oscillating result of an inquiry by the jury" under a license to explore the morass of proximate cause.

It is submitted that the courts should face the issue squarely and when the situation called for a determination of an issue by the court, the court should decide it and not evade its responsibility by passing it on to the jury under the "proximate cause" formula.

WILLIAM S. TRIBELL

[30] David v. Kinkle, 302 Ky. 258, 194 S.W. 2d 513 (1946); Raybold v. Gnoyer, 285 Ky. 618, 148 S.W. 2d 728 (1941).